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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218422.2 **DATE:** May 13, 1985

MATTER OF: Mayden & Mayden--Reconsideration

DIGEST:

Prior decision sustaining a protest on grounds that negotiations for a building lease were improperly conducted with the awardee without negotiating with the protester, whose proposal was also within the competitive range, but recommending no corrective action because lack of termination for convenience clause could subject government to claim for substantial damages, is affirmed upon reconsideration where the protester has shown no error of law or fact which would warrant reversal.

Mayden & Mayden (M&M) requests reconsideration of our decision in Mayden & Mayden, B-213872.3, Mar. 11, 1985, 85-1 ¶ CPD 290. In that decision, we sustained M&M's protest of a Department of Agriculture award of a building lease to Roth-Radcliffe Company (R-R) under request for proposals (RFP) No. R4-83-11 because discussions after best and final offers were held with R-R, but not with M&M whose proposal was also within the competitive range. Our decision noted that we would normally recommend reopening of negotiations and the submission of best and final offers based upon, among other things, the changed building site R-R proposed after it received the award.[1/] We determined, however, that because the lease contained no clause permitting termination for the convenience of the government, and because R-R's actions did not appear to provide a basis for cancellation of the lease, we could not make any recommendation for corrective action without placing the government at risk of a claim for substantial damages. M&M requests that we reconsider our failure to recommend termination or cancellation of R-R's lease.

We affirm our original decision.

[1/] The changed location was offered after award because the original site proposed apparently will not accommodate a septic field that is adequate for the building.

Our Office will reconsider a decision when the person requesting us to do so specifies that the initial decision contains an error of law or information not previously considered. See 4 C.F.R. § 21.12(a) (1985). Information not previously considered refers to information which was previously overlooked by our Office or information that the requester did not have access to when the protest was pending. S.A.F.E. Export Corp.--Request for Reconsideration, B-215022.4, Sept. 17, 1984, 84-2 CPD ¶ 298. Mere disagreement with our prior decision provides no basis for reversing that decision. Atlas Contractors, Inc.-- Request for Reconsideration, B-209446.3, June 30, 1983, 83-2 CPD ¶ 46.

In its request that we reconsider our failure to recommend corrective action, M&M contends that R-R knew, or should have known, that the building site it initially proposed would not be acceptable and that, therefore, R-R's offer was not made in good faith, thereby providing a basis for cancellation of the lease. In support of this contention, M&M submits an affidavit of its managing partner stating that his investigation indicated that at the time of proposal submittal, R-R did not own the site or have a "recorded option" to purchase it and that the county engineer informed M&M after the protest that it had been well known for a number of years that the nature of soil of the site would not permit a septic tank of sufficient size to accommodate the required building.2/

In its initial protest and its rebuttal to the agency's report, M&M challenged the good faith of R-R on the same grounds and has merely supplemented this contention with the affidavit. We considered and rejected this contention as a basis for recommending contract cancellation in our initial decision, and we find nothing in the affidavit which warrants a contrary conclusion now.

Cancellation is a remedy reserved for contracts illegally awarded, and an illegal award results only if it was made contrary to statutory or regulatory requirements because of some action by the contractor or if the

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2/ Apparently the county engineer's opinion is based upon the fact that the originally proposed site does not provide a sufficient tile drain field for the waste water flowing through the septic tank.

contractor was on direct notice that the procedures being followed violated the requirements. Stryker Corp., B-208504, Apr. 14, 1983, 83-1 CPD ¶ 404. Nothing in the solicitation required that an offeror, at the time of proposal submittal, had to own or have a purchase option, recorded or otherwise, for the site on which it proposed to construct the required building. Further, while the information obtained from the county engineer may indicate that R-R was in error as to the acceptability of the original site, there is no evidence to indicate that R-R proposed a site it knew to be unacceptable. Therefore, there is no basis to conclude that improper action by R-R contributed to the improper award so as to permit cancellation of the contract without the risk of liability.

M&M further contends that R-R should have been required to prove by clear and convincing evidence that its participation in the negotiations was not improper or, alternatively, that we should have ruled that when any offeror negotiates under circumstances that are deemed to be improper, the other offerors should be entitled to submit alternative plans or that the requirements should be resolicited. The first alternative approach advocated by M&M in its request was implicit in its initial allegations and we found no evidence that R-R initiated the negotiations after best and final offers or was doing anything other than responding to the agency's questions. The second alternative we agreed with to the extent that we held it to be improper to negotiate with one offeror without giving the others in the competitive range the same opportunity. Nonetheless, the fact remains that there is no termination clause in the contract and that outright cancellation is not an appropriate remedy in this case.

Thus, we find nothing in M&M's request to warrant reversing our conclusion.

The original decision is affirmed.

for Comptroller General
of the United States